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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/524,373	09/12/2005	Joan Schnieber	02280.003420.	4712
5514 7590 02/18/2010 FITZPATRICK CELLA HARPER & SCINTO 1290 Avenue of the Americas NEW YORK, NY 10104-3800				
EXAMINER				
TRAN LIEN, THUY				
ART UNIT		PAPER NUMBER		
1794				
MAIL DATE		DELIVERY MODE		
02/18/2010		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/524,373

Applicant(s)

SCHNIEBER ET AL.

Examiner

Lien T. Tran

Art Unit

1794

Period for Reply -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 04 December 2009.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-12 and 14 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-12 and 14 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO/GS/US)
Paper No(s)/Mail Date 12/7/09

- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

Claim 6 is rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention.

The specification does not teach how to make dry component that is fat based, dairy based, protein based, grain based and mixtures of these. One skilled in the art does not know what ingredients to use, how much to use. The specification only teaches dry component to be a dough layer.

In the response filed 12/4/09, applicant states the examiner is confusing between the dry component with the dough layer; applicant asserts that the dry component is not the dough layer, but one of the several components used to form the outer dough layer. The rejection does not stem from the confusion between dough layer and dry component. The claim is rejected because the specification does not teach how to make the dry component that is fat based, dough based, dairy based, protein based, grain based or mixture thereof. The dry component is used to make the dough layer; before the dough layer is made, the dry component for it must be known. The paragraphs pointed out by applicant disclose materials that can be used as dry component. However, there is no teaching of how to make the dry component that is fat based, dairy based, protein based, grain based or mixture thereof. What kind of ingredients does one use to make a fat based dry component and how much of the ingredients to use. It is not known what is meant by fat based, or protein based. The examples disclosed are all directed to dry component that is used to form a dough layer;

they are not directed to the component as claimed. If applicant intends to claim that the dry component further comprises a fat, a protein, a starch etc., then it is suggested applicant uses such language.

Claims 1,6 and 15 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 1 is vague and indefinite. The claim recites that the outer dough layer is formed from the edible layered component comprising the base liquid and the dry component having flour. However, the Markush group recites that the outer dough layer is selected from the group consisting of a cracker, bread, cookie, muffin, granola, cereal, soft pretzel and mixture thereof. It is unclear how the same edible layered component comprising the base liquid and dry component having flour can give such diverse group of outer dough layer. Cracker is not the same as bread, or cookie or muffin or granola, or cereal or soft pretzel. Each one of these dough products requires different formulation because they are not the same product.

The amendment to claim 1 removes some of the indefiniteness but the claim is still vague and indefinite as explained above.

Claim 6 is vague and indefinite as stated in the previous office action. In the response filed 12/4/09, applicant argues that the dry component alone is not the outer dough layer. The dry component is the main ingredient making up a dough because the hydrating liquid does not form a dough. Furthermore, it is still not clear what is constituted by "based"; applicant argues that it means anything greater than 50%. But,

this is not defined in the specification. The specification does not disclose any other dry component other than ingredients making up a dough.

Claims 1-12, 14 are rejected under 35 U.S.C. 112, first paragraph, because the specification, while being enabling for the specific formulations disclosed in the specification, does not reasonably provide enablement for the method as claimed. The specification does not enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to carry out the invention commensurate in scope with these claims.

The method of claim 1 recites the step of forming an outer dough layer on an edible core by applying a base liquid and a dry component having flour. The outer dough layer is stated to be selected from cracker, bread, cookie, muffin, granola, cereal, soft pretzel and mixtures thereof. The specification discloses different formulations for different types of dough product. Example 1 discloses a sweet dough comprising wheat flour, oats with brown sugar, wheat germ and flour salt as the dry component. Example 2 discloses soft pretzel comprising flour, shell dry mix, gum and salt. Example 3 discloses bread which contains different ingredients from the products of examples 1-2. It is not seen how one can make the different types of dough layer as recited in claim 1 using the same base liquid and dry component.

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140

F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-12 and 14 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-3, 6-11, 13 and 19 of copending Application No. 10/524369. Although the conflicting claims are not identical, they are not patentably distinct from each other because both applications are directed to a method of making a shelf stable edible snack comprising a core and an outer coating comprising of a base liquid and a dry component. The difference resides in the types of coating layer and core material. However, it would have been obvious to vary the coating material and core component depending on the taste and flavor desired. It would also have been obvious to roast the dry component when desiring a roasted flavor and taste..

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claims 1-12 and 14 are free of prior art for the reason of record.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lien T. Tran whose telephone number is 571-272-1408. The examiner can normally be reached on Monday-Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on 571-272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

February 11, 2010

/Lien T Tran/

Primary Examiner, Art Unit 1794